

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1122

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

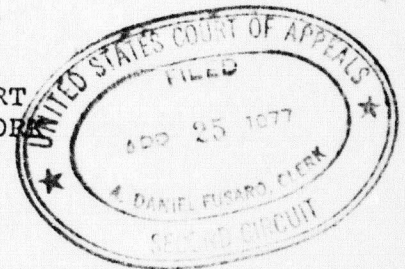
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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
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-against- :
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ROBERT L. HOPKINS, :
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Defendant-Appellant. :
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Docket No. 77-1122

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BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether this case presents any non-frivolous issues to be
raised on appeal for review by this Court.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen) rendered on April 11, 1977, convicting appellant Robert L. Hopkins of embezzlement of bank funds (Counts One and Two), in violation of 18 U.S.C. §656, and of making false entries in bank records with the intent to defraud (Counts Three and Four), in violation of 18 U.S.C. §1005. Appellant was sentenced to nine months in custody on Counts One and Three, the terms to run concurrently, and to two concurrent three-year terms of probation imposed on Counts Two and Four, to run consecutively to the terms of custody imposed.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged with the theft of two night deposit bags of the Cohen Optical Company (hereinafter, "Optical") on February 1 and 4, 1974, and with making false entries in bank records with respect to those bags. Much of the Government's case went to describing the night deposit procedures of the Bankers Trust Company branch involved and the record-keeping

procedures of Optical. The remainder of the evidence was concerned with appellant's conduct.

A. The Bank Procedures

Night deposit customers of the bank would receive canvas bags closed by a zipper and a lock. Each bag had a number written on it (26*). Customers would also receive a key to the bank's night deposit chute (27). The bag would be dropped down the night deposit chute into the bank vault (26).

There were two types of accounts: regular depository accounts, and accounts subject to count (27). The subject-to-count customers gave the bank permission to open the bag and process the deposit without the customer's being present (28). The regular depository customers came into the bank, were given the bag, and then made the deposit (28).

Each morning, two people from the bank open the night depository vault (29) and remove from it the bags deposited the previous day (31). The numbers on the bags found in the vault are then listed on a "control sheet." Those bags that had been in the vault from prior nights because they had not been picked up by the customer during the next working day or days after they were dropped in the chute are called "holdovers"***

*Numerals in parentheses refer to pages of the trial transcript.

**Any bag not picked up, whether subject to count or regular, is returned to the vault. The regular account bags are returned empty (32-33).

and listed first on the sheet (31). Those bags that are removed from the vault for the first time are then listed on the control sheet (31-33). At the bottom of the sheet is listed the total number of bags taken from the vault (33). Both tellers removing the bags from the vault sign the control sheet (34; see also 174-176).

After the control sheet is prepared, the bags are taken to the banking floor where a teller counts them, puts them in numerical order, and places them in a drawer, removing the subject-to-count bags (35).^{*} Those bags are then processed (36).

The teller processing the bags prepares a receipt. The receipt requires the bag number, the title of the account, and the date, dollar amount, and teller's initials (37). The receipt is put into the bag which is then locked, folded in half, ticketed, and placed into the drawer with the other bags (37). The name of the account is written on the control sheet.

The regular account bags are left in the drawer until the customers come to claim them (38). A receipt would be made out with the bag number, name of the customer, and the teller who handed it out. The customer would sign the receipt when he received the bag (39). Thereafter the deposit would be processed and the receipt placed in a box (40).

^{*}The subject-to-count bags are determined by reviewing the bank records.

The drawer in which the bags were kept at Bankers Trust was available to all tellers (56).

At the end of the day, all bags left in the drawer would be listed on the reverse side of the control sheet (40). For the remainder, the receipts would be consulted. Any regular account bag picked up during the day would have two checks placed on the control sheet and the customer's name entered (41). For subject-to-count bags, one check would be entered (41). However, counsel elicited on cross-examination that the charts often showed one check when there should have been two (75-76). Each check indicated that there was a receipt (42). The receipts were stapled to the front of the control sheet (44).

The remaining bags would be placed in a canvas bag and returned to the vault with the control sheet, which was dated and initialed by the tellers doing the check (66). If the night depository clerk forgot to sign, the person who put the bags into the vault would do so. Whoever signed the sheet was verifying the accuracy of the contents (66).

This evening work was generally done by two people on Monday and Friday nights (64).

B. The Cohen Optical Company's Procedures

In 1974, Optical was a customer of the bank, having a regular depository account with eight bags (45-46). The procedures of Optical were to place cash and chits, which

represented checks and credit charges, in the three cash registers (100). Each register has four drawers, of which four were working (102). The contents of these drawers were put into separate envelopes, the envelopes tied together and placed into a night depository bag (101). A depository bag was placed in the chute once daily, and the bags would be reclaimed once a week, when they would be taken back to the store and the deposits prepared by Cohen's (105).

On January 28, 1974, Nizewitz, an employee of Optical, took six bags out of the bank (688, 601, 523, 691, 692, 693; 107). Since the Cohens were on vacation and more bags were needed, Nizewitz, in the usual procedure (106-107), took the six bags to the bank vault, consolidated several of them, and redeposited the full ones by dropping them into the chute (112). In the following days, Nizewitz dropped the remaining bags into the chute (108).

C. The Lost Night Depository Bags

On February 5, 1974 (89), it was discovered that two Optical bags were missing from the night depository at Bankers Trust Company when someone from Cohen came to pick them up and they were not in the drawer (89) or listed on the control sheet for that day as either holdovers or new bags (47).

The night depository record of February 1, 1974 (Exhibit 5) and of February 4, 1974 (Exhibit 6) (49) showed check marks for bags 693 and 3[sic]23 (should be 523) (53). Bag 693 had

first been taken out of the vault and entered on the control sheet on January 29, 1974 (Government Exhibit 2),* and Bag 523 had been taken out of the vault on February 1, 1974 (Government Exhibit 5). When the two bags were reported missing, to ascertain the contents of the bags, Optical checked the cash register tapes against the deposits of a particular day and the dated envelopes used to empty each cash register drawer. Each tape contained many days' transactions. Although the tapes were not divided by date, the end of each day's transactions was reflected on the tape by a Z, the clearing mark. Thus, when the transactions on the tape were compared to the dated envelopes, it was possible to determine what segment of the tape reflected each day's intake (118).

Deposit slips and bank records of Cohen Optical were introduced into evidence (121-122). In a chart made from these records, it was shown that on January 28, the approximate total of cash sales by Optical was \$722.76 (180); on January 29, it was \$1,766.80; on January 30, it was \$1,130.40; and on January 31, it was \$2,184.30 (183).

When the bags were reported lost, the bank, including its garbage, was searched, but no receipts were found.

The chief teller, Barjian, testified that the control sheets for February 1 and 4 were prepared by appellant (54). However,

*The bag had been placed in the chute on January 27, 1974, but was apparently one of the six reclaimed by Nizewitz on January 28.

on February 1, Annette Harris was the night depository control clerk. Harris worked with appellant on the bags (68-70), and she signed the control sheets (95). Although Harris was thus verifying the accuracy of the sheets by signing them, she did not check to determine their accuracy or bring to the attention of anyone in the bank that the name of the depositor of bag 693 was missing from the control sheet (71).

Harris also testified that her teller's station was close to the night deposit drawer (96), that she handled the deposits more regularly than other tellers (96), that she was familiar with night deposit customers (97), and that she knew that Cohen Optical bags would be left for a long period of time and contained large amounts of money (98).

On February 7, Carl Palm, a security officer for Bankers Trust, interviewed appellant (129). Appellant was told that two depository bags were missing and that check marks appeared next to the bags' numbers on the control sheets. Appellant said that the receipts for the bags should be attached to the sheet because the bags were checked (131).

Palm testified that appellant voluntarily stated that on February 1, 1974, he found a bag containing \$1,800 in a telephone booth in Greenwich Village (132). With the money, he bought suits, shoes, coats, and a television set (132).

On February 8, Palm interviewed appellant again, inquiring for more details (135). Later that day, appellant was interviewed by FBI agent Dennis Shea. With reference to the control

sheets, appellant said that if there was a check mark, there must have been a receipt (155). Appellant acknowledged that his handwriting was on the control sheets for February 1 and 4, and that he must have made a mistake by omitting the name of the company (156-157).

Appellant told Shea that he, with a friend named Rocky Jeffers, found a bag of money in a telephone booth (158).

Shea and Palm then interviewed Jeffers (159). Jeffers testified that while he and appellant were shopping in the Village, Jeffers waited while appellant went into a telephone booth. Then appellant left the booth and ran up the street. Jeffers followed him. When they stopped, appellant stated that he had found some money (199). Jeffers saw an envelope containing money (207). The two men then went on a shopping spree (202).

Over defense counsel's objection (188), the court permitted the Government to introduce evidence that no report of a loss of \$1,800 was filed in the Sixth Precinct, the one in which the particular telephone booth was located (216-217). Counsel argued that people often do not know where they have lost property, and so do not report it in the precinct of the loss. Further, it was asserted that people often do not report the loss of large amounts of cash (190). Judge Owen concluded that the evidence was admissible and that the jurors might give it whatever weight they believed was due it (191).

After deliberations, the jury returned a verdict of guilty.

STATEMENT OF POSSIBLE ISSUES ON APPEAL

A. Credibility

During the examination of the witness Harris, defense counsel produced evidence that Harris had an opportunity and the necessary knowledge to commit the theft. However, the jury was free to reject this theory, as well as the defense theory that appellant had found the money, and by its verdict, did so.

B. Admissibility of evidence that no one had reported a loss of money in the Sixth Precinct

Over defense counsel's objection, the Government was permitted to call a police officer who testified that no one had reported to the Sixth Precinct a loss of \$1,800 in January or February 1974. Counsel argued that a loss might not be reported at all, or might be reported in another precinct. The judge permitted the jurors to give the evidence whatever weight they deemed appropriate.

The Assistant United States Attorney argued in his summation that the absence of a report of lost money was evidence that the defense was incredible (259). In response, defense counsel argued:

Finally, Mr. Bentley relies on the fact that, well, there is no report in the Sixth Precinct about the \$1,800, and therefore he

says its patently ridiculous that anybody could have lost that money. Well, analyze that testimony. I think all of us have enough common sense to know that \$1,800 is an unusual amount of money to be carrying in cash. I think most of us have common sense enough to know that people who are carrying that large an amount of money are often carrying it for purposes that people don't know about, and it might very well be that whoever lost that money would prefer to be in a position where he would not have to do any explaining.

Consider the neighborhood. I don't think you can dismiss the possibility that was money that was left there as a drop, and certainly if that were the situation nobody would be coming around to the police to check.

Finally, consider that all we heard from the police witness was that he made a check of the Sixth Precinct's records. Let's assume that I had \$1,800 and I got home and discovered that I had lost it, but I lived in the Bronx, and I had been in a million places during the day. I don't know that I would necessarily have known to call the Sixth Precinct.

The witness made it quite clear that it's really only if you know where you lost the money that you would be able to focus in on the particular precinct. So the fact that the Sixth Precinct doesn't have a record of the money being turned in is hardly the kind of stuff from which you could conclude that the money was not lost and that Mr. Hopkins did not find it.

(283-284).

In his charge, Judge Owen charged on circumstantial evidence and inferences to be drawn therefrom, and he said, "It is for you to decide and for you alone, as to what inferences you may reasonably and fairly draw from the evidence before you." (Appendix C at 315.)

The absence of a reported loss can logically be interpreted either as the Government or as the defense claimed. Accordingly, the admission of the evidence with a proper instruction on inference was proper.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues to be raised on appeal for this Court's review; accordingly, an order should be entered relieving The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 25, 1977

I certify that a copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

[Signature]